

**BEFORE THE APPEALS BOARD  
FOR THE  
KANSAS DIVISION OF WORKERS COMPENSATION**

**JOHN M. RIVERA, III**  
Claimant

VS.

**WESTAR ENERGY**  
Self-Insured Respondent

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Docket No. 1,031,667

**ORDER**

Respondent appealed the March 28, 2008, Order for Medical Treatment entered by Administrative Law Judge Brad E. Avery.

**RECORD ON APPEAL**

The record consists of the July 2, 2007, regular hearing transcript; the September 17, 2007, preliminary hearing transcript and the attached exhibits; and the October 15, 2007, medical report from Dr. Peter S. Lepse, which respondent attached to its brief to the Board and to which claimant agreed should be part of the record on appeal.

**ISSUES**

This is a claim for a November 8, 2005, accident. Respondent accepts that claimant injured his left knee in that accident. But respondent disputes claimant injured his right knee in that accident. In its brief to the Board, respondent also contends claimant failed to timely notify it of the right knee injury.

Following a September 17, 2007, preliminary hearing Judge Avery ordered respondent to provide claimant with medical treatment. That Order for Medical Treatment, which was entered on September 20, 2007, read, in part:

**Medical treatment is granted and ordered paid on claimant's behalf by respondent and insurance carrier** with Dr. Lepse until further order for evaluation bilaterally to claimant's knees and/or referral for pain management if the doctor deems it necessary to cure and relieve the effects of his 11/8/05 injury.<sup>1</sup>

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<sup>1</sup> ALJ Order for Medical Treatment (Sept. 20, 2007).

Neither party appealed the September 20, 2007, Order to the Board.

Following a telephone conversation between counsel and Judge Avery, the Judge entered the March 28, 2008, Order for Medical Treatment, which read in pertinent part:

**Medical treatment is granted and ordered paid on claimant's behalf by respondent and insurance carrier** with Dr. Lepse for knee surgery to his right knee, per phone conversation until further order.<sup>2</sup>

Respondent contends Judge Avery erred. Respondent argues claimant's right knee injury did not arise out of claimant's November 8, 2005, accident and claimant "has never made claim or put Respondent on notice of any injury to his right leg."<sup>3</sup> Accordingly, respondent requests the Board to reverse the March 28, 2008, Order.

Claimant argues that during the attorneys' telephone conversation with the Judge respondent's counsel requested the Judge to enter an order (which resulted in the March 28, 2008, Order for Medical Treatment) in order to appeal the adverse findings regarding compensability the Judge made against respondent in the September 20, 2007, Order for Medical Treatment. Claimant argues the March 28, 2008, Order is merely a restatement of the September 20, 2007, Order and this appeal is, in essence, an untimely appeal of that Order. Accordingly, claimant requests the Board to dismiss this appeal. In the alternative, claimant argues the evidence establishes that his right knee complaints are directly related to his November 8, 2005, accident and, therefore, the March 28, 2008, Order should be affirmed.

The issues before the Board on this appeal are:

1. Is respondent precluded from raising the compensability issues regarding accident and timely notice when it did not appeal the September 20, 2007, Order for Medical Treatment?
2. If not, may the Board review the issue of timely notice and of whether claimant injured his right knee in the November 2005 accident when the record fails to disclose those issues were presented to the Judge for decision at the time of the March 28, 2008, Order for Medical Treatment?

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<sup>2</sup> ALJ Order for Medical Treatment (March 28, 2008).

<sup>3</sup> Respondent's Brief at 4, 5 (filed Apr. 14, 2008).

**FINDINGS OF FACT AND CONCLUSIONS OF LAW**

After reviewing the record compiled to date and considering the parties' arguments, the Board finds as follows:

Claimant has worked for respondent as a lineman for more than 30 years. On November 8, 2005, claimant, who is 5'7" and weighs approximately 280 pounds, fell four or five feet into an open ditch and landed on his knees. Claimant experienced immediate pain in his left knee and chest. The parties agree the accident arose out of and in the course of employment with respondent.

Within 24 hours, claimant reported the incident and his left knee pain to his supervisor. Approximately a week and a half later, claimant also began experiencing symptoms in his right knee. Claimant, however, did not notify respondent of those symptoms until much later.

Approximately a month after the November 2005 incident, claimant sought medical treatment for his left knee at a hospital emergency room. In late January 2006, claimant began treating with Dr. Peter S. Lepse. An MRI revealed a torn meniscus and on March 1, 2006, claimant underwent left knee surgery that included a chondroplasty, partial medial meniscectomy, and the removal of loose bodies. Dr. Lepse eventually released claimant from medical treatment and claimant returned to work for respondent.

In May 2006, Dr. Phillip L. Baker, an orthopedic surgeon, examined claimant at respondent's request. Dr. Baker found degenerative changes in both of claimant's knees and noted claimant had not received any treatment for his right knee. Moreover, the doctor concluded the right knee was also involved in the November 2005 accident. Dr. Baker wrote, in part:

It is the opinion of this examiner that the claimant had pre-existing degenerative changes in both knees, actually worse in the right than in the left. The meniscal tear, in the opinion of this examiner, occurred at the time of his injury. Impact on the articular cartilage surface of the medial compartment of the right knee would have also occurred at the time of the accident.<sup>4</sup>

Then in December 2006, at his attorney's request, claimant was examined by Dr. Edward J. Prostic, another orthopedic surgeon. Dr. Prostic determined claimant needed a right knee arthroscopic debridement and possibly bilateral high tibial osteotomies.

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<sup>4</sup> P.H. Trans., Cl. Ex. 2 at 3.

In February 2007, the parties attended a prehearing settlement conference. Following that conference, in early April 2007, Dr. Peter V. Bieri examined claimant at the Judge's request and rated claimant's left lower extremity. During that examination claimant told Dr. Bieri that he had experienced right knee pain since the accident. Noting claimant had received neither significant diagnostic procedures nor treatment for his right knee and that claimant's medical records failed to document a right knee injury, Dr. Bieri was unable to rate claimant's right lower extremity. The doctor wrote, in part:

While the claimant complains of some current symptomatology involving the right knee, the available documentation fails to reflect any injury involving the right, nor any significant diagnostic or treatment interventions. Accordingly, the claimant fails to demonstrate any permanent impairment of the right knee at the time of this evaluation directly attributable to the injury in question.<sup>5</sup>

When it became apparent at claimant's July 2007 regular hearing that he desired medical treatment for his right knee, the hearing was stopped and continued for a later date. Claimant then requested a preliminary hearing, which was heard on September 17, 2007. As indicated above, the September 20, 2007, Order for Medical Treatment reads, in pertinent part:

**Medical treatment is granted and ordered paid on claimant's behalf by respondent and insurance carrier** with Dr. Lepse until further order for evaluation bilaterally to claimant's knees and/or referral for pain management if the doctor deems it necessary to cure and relieve the effects of his 11/8/05 injury.<sup>6</sup>

Accordingly, that Order gave Dr. Lepse very limited authority to treat claimant. The Order authorized the doctor to perform two acts: evaluate claimant's knees and refer him for pain management.

Later, on March 28, 2008, the Judge entered another Order for Medical Treatment after having a telephone conversation with counsel but without a formal hearing. A record was not taken of the telephone conversation. Consequently, the record does not establish what arguments or representations were presented to the Judge at that time. Likewise, there is no record of the issues the parties were requesting the Judge to address in either the telephone conversation or the March 2008 Order. But, unlike the earlier preliminary hearing Order, the March 28, 2008, Order for Medical Treatment authorized Dr. Lepse to operate on claimant's right knee, which significantly expanded the doctor's authority.

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<sup>5</sup> *Id.*, Cl. Ex. 3 at 6.

<sup>6</sup> ALJ Order for Medical Treatment (Sept. 20, 2007).

In short, the March 28, 2008, Order for Medical Treatment came about in an unusual manner. In his brief to the Board, claimant indicated respondent requested the Judge to issue the resulting March 28, 2008, Order. Claimant does not contend that he objected to the Order being issued. Indeed, claimant acknowledges he had hoped the requested Order would satisfy respondent's objection regarding medical treatment to the right knee. And respondent neither denies that it requested the Judge to issue an Order nor contends the Judge lacked the authority to issue an Order.

The undersigned finds the March 28, 2008, Order is valid because it was entered at respondent's request with claimant's acquiescence. Moreover, the procedural defects leading to the issuance of the Order were waived by the parties.

In this appeal respondent argues claimant's right knee problems are unrelated to the November 2005 accident. Respondent also argues it did not receive timely notice of the right knee injury. But because the record fails to establish those issues were presented to the Judge and to be addressed in the March 28, 2008, Order for Medical Treatment, they may not be considered for the first time on appeal. The Board's jurisdiction is limited to those issues first presented to the administrative law judges. The Workers Compensation Act provides, in part:

There is hereby established the workers compensation board. The board shall have exclusive jurisdiction to review all decisions, findings, orders and awards of compensation of administrative law judges under the workers compensation act. The review by the board shall be upon questions of law and fact as presented and shown by a transcript of the evidence and the proceedings as presented, had and introduced before the administrative law judge. . . .<sup>7</sup>

In conclusion, this appeal should be dismissed. But respondent does have recourse. The Workers Compensation Act does not limit the parties to only one preliminary hearing. Respondent might consider requesting an additional hearing for the Judge to address the issues it now raises. In any event, the Orders entered by the Judge should be honored until modified.

By statute, preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.<sup>8</sup> Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2007 Supp. 44-551(i)(2)(A), unlike appeals of final orders, which are considered by all five members of the Board.

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<sup>7</sup> K.S.A. 2007 Supp. 44-555c(a).

<sup>8</sup> K.S.A. 44-534a.

**WHEREFORE**, respondent's appeal of the March 28, 2008, Order for Medical Treatment is dismissed.

**IT IS SO ORDERED.**

Dated this \_\_\_\_ day of May, 2008.

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KENTON D. WIRTH  
BOARD MEMBER

c: Bruce Alan Brumley, Attorney for Claimant  
Gary E. Laughlin, Attorney for Respondent  
Brad E. Avery, Administrative Law Judge